LIABILITY FOR NEGLIGENT LANGUAGE.

CAN an action ever be maintained for negligence in the use of language? Or, to put it more fundamentally: Is there ever a legal duty, except when created by contract, to be careful in the use of language? That there is no such universal duty may be conceded. But our inquiry is whether there are any conceivable circumstances under which such a duty may be held to exist. Can it be said that "the law, as distinguished from contract, does sometimes impose a duty to take reasonable care to tell the truth"?[1]

The discussion of this question has been suggested by the result reached by the House of Lords in 1889, in the case of Peek *v.* Derry.[2] In that case, Derry *et als.*, the directors of a tramway company, put forth a prospectus to induce the public to subscribe for stock. The prospectus contained the following unqualified statement: " . . . the company has the right to use steam or mechanical motive power instead of horses, . . ." In fact, the company had not such right. The statute permitted the use of steam as a motive power only in case the company first obtained the consent of the Board of Trade and of two municipal boards. Some of these consents were never obtained, and the stock was worth less than if the company had had the right to use steam. Peek, a stockholder who had purchased on the faith of the prospectus, sued the directors for deceit in making the above positive representation. The judge of first instance (Stirling, J.) and the Law Lords took a very charitable view of the evidence, and were of opinion that the directors all believed the statement to be true, even though they had no reasonable ground for such belief.[3] The Court of Appeal (Cotton, Hannen, and Lopes, L. JJ.) unanimously held the directors liable in this action for deceit, on the ground that they made the statement without any reasonable ground for believing it to be true. The House of Lords overruled the Court of Appeal, and restored the decision of Mr. Justice Stirling, who held that the defendants were not liable.

[1] See Moncrieff's Law of Fraud and Misrepresentation, 152, 154.

[2] L. R. 14 Appeal Cases, 337.

[3] For an able criticism of the view that the directors all believed the statement, see 5 Law Quarterly Review, 420–422; and compare 6 Law Quarterly Review, 73.

Taking the facts to be as they were understood by the Law Lords, this decision of the House of Lords seems to be correct. The action, though brought under the modern forms of procedure, was, in substance, the old action on the case for deceit, and it was so treated by the counsel on both sides and by the judges. In such an action the plaintiff alleges that the defendants have consciously falsified; *i. e.* that they have stated what they did not believe to be true. He cannot maintain this allegation by showing merely that they have stated what they ought not to have believed. Want of reasonable ground for belief is, of course, a piece of evidence bearing on the question of non-belief. But if it fails to convince the tribunal of the non-existence of belief, it does not make out a case of deceit. "Negligence is not the same as fraud." An action of deceit based on fraud cannot be supported by proof of negligent misrepresentation. "A plaintiff cannot succeed in an action for fraud without proving that the defendant was fraudulent." "If a man complains of having been deceived, he must show that the defendant is a liar," and not merely negligent.

Assuming the House of Lords to be right in holding that the plaintiff in Peek *v.* Derry could not recover for the cause of action which he had declared upon, the question remains whether the plaintiff would have succeeded if he had sued for negligence, alleging a duty on the part of the defendant to use reasonable care.

This extremely important inquiry has not, in England, received the attention it deserves. In English courts it is now summarily dismissed with the short statement that it was "decided" in the negative by the House of Lords in Peek *v.* Derry; that it was there "finally decided," "settled for good."[1] That case, "as interpreted by the courts, is held to show not only that negligence is not the same as fraud, but also that no action whatever will lie for negligent misrepresentation."[2] But this interpretation is erroneous. No doubt Lord Herschell, who gave the principal opinion, took it for granted that an action for negligence could not have been maintained against the defendants; but this assumption of that very able judge is at the most a mere *dictum*. The point was not, and could not have been, there decided; for it was not before the court. The only question was whether the

[1] See Bowen, L. J., in Angus *v.* Clifford, L. R. (1891) 2 Chan. 449, p. 470; Lindley, L. J., S. C., p. 464; Bowen, L. J., in Le Lievre *v.* Gould, L. R. (1893) 1 Q. B. 491, p. 501; Lindley, L. J., in Bishop *v.* Balkis Consolidated Co. (1890), L. R. 25 Q. B. D. 512, p. 521.

[2] 7 Law Quarterly Review, 310.

action for deceit would lie. "Because an action for deceit, involving fraud, cannot be based on a merely negligent misrepresentation," it does not necessarily follow that there is to be "no action for negligence." [1]

The plaintiff in Peek *v.* Derry could not, upon that declaration, have recovered for negligence; for the simple reason that he had not alleged negligence, but an entirely different thing, viz. fraud. Under that declaration, evidence of negligence, if offered as sustaining a substantive cause of action, would have been rejected on the ground of variance.[2] But whether the plaintiff might have recovered for negligence *if his declaration had averred negligence*, is an entirely different question, and is not concluded by that decision. Suppose that Peek, on the very next day after the rendition of final judgment for the defendants in the original action of deceit, had brought a new action claiming to recover on the ground of the defendant's negligence, could the defendants have successfully pleaded the judgment in the former action of deceit in bar of this new action for negligence? It hardly seems reasonable to say that negligence is to be excluded as a ground for recovery in cases of misrepresentation, "simply because the old action for deceit recognized only intentional misrepresentation as within the scope of that action." [3]

The English law, both as it might have been, and as it practically is, will be found well summarized in Pollock's Law of Fraud in British India: "The law might have made this much the positive duty, apart from any question of contract, of persons who, for their own purposes, volunteer statements for others to act upon in matters of business; namely, not that the statement shall be absolutely true, but that reasonable care shall be used to verify it before it is made. But it is now settled that such is not the law in England. . . . We may like it or not, but English courts must now decline to recognize a positive duty of using any, even the lowest degree of diligence, in making allegations about supposed matters of fact. We must go upon the bare issue of belief. Gross and palpable want of reasonable grounds may lead us to find that there was no belief at all; in other words, to say that there was actual falsehood, the falsehood which is the necessary and specific badge of fraud. But it will be fraud or nothing." [4]

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[1] Moncrieff's Law of Fraud and Misrepresentation, 152.

[2] Proof of want of reasonable ground for belief would have been admissible only as bearing on the issue of the non-existence of belief.

[3] See Innes, Principles of Torts, 54, note.

[4] Pollock, p. 93.

The above view as to the *settled* nature of the English law rests, as has been shown, upon a *dictum* in the House of Lords.[1] That tribunal has recently held that it cannot (which simply means that it does not choose to) overrule its own decisions;[2] but we are not aware that it has yet held that its *dicta* are not open to future question. This particular *dictum* has not passed into settled doctrine without vigorous protest.[3] "It has already been found necessary in England to obviate its effects as regards future cases arising on the prospectuses of companies and other invitations to subscribe for shares or debentures by special legislation."[4]

In the United States this question is not concluded by authority. Shall those American courts which deny a remedy for deceit, in cases like Peek *v.* Derry,[5] allow the remedy for negligent misrepresentation which the English courts are understood to deny; or shall the possibility of obtaining remedy in such cases be left to legislative discretion?

Let it be noted that we are not at this moment considering the question whether the law should recognize and enforce a general duty, of all the world to all the world, to be careful in all statements, upon all subjects; nor whether the law should recognize as broad a duty of care in the utterance of language as in all other acts or relations of life. The present inquiry is comparatively a narrow one, viz., whether the law should recognize a duty to be careful in the use of language, if the enforcement of such duty

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[1] We are speaking now of the way in which this point has been dealt with by the highest English tribunal. We do not assert that there are no cases in the lower courts which uphold this view. See the opinion of Bramwell, L. J., in Dickson *v.* Reuter's Telegraph Company (1877), L. R. 3 Com. Pl. Div. 1, p. 6. Compare Moncrieff's explanation of Lord Justice Bramwell's position, Moncrieff, 152.

[2] London Street Tramways Co. *v.* London County Council, L. R. (1898) Appeal Cases, 375.

[3] See 9 Law Quarterly Review, p. 202; 8 Law Quarterly Review, p. 7. In this connection it seems proper to say that the present article is suggested by, and largely founded upon, English criticisms of the prevailing English view.

[4] Pollock's Law of Fraud in British India, 55, referring to "The Directors' Liability Act," (1890) 53 and 54 Vict. ch. 64: By this statute, directors and others issuing prospectuses are made liable, in certain cases, to compensate persons sustaining loss by reason of any untrue statement in the prospectus, unless it is proved that the parties issuing the prospectus had reasonable ground to believe, and did believe, that the statement was true.

[5] The decision of the House of Lords in Peek *v.* Derry is not universally followed in the United States. For expressions of the contrary doctrine, see Seale *v.* Baker (1888), 70 Texas, 283; Watson *v.* Jones (Florida, 1899), 25 Southern Reporter, 678; Gerner *v.* Mosher (Nebraska, 1899), 78 Northwestern Reporter, 384; Krause *v.* Busacker (Wisconsin, 1900), 81 Northwestern Reporter, 406. In many States the question is still an open one.

could be confined to cases like Peek *v.* Derry. Of course, if this question is answered affirmatively, other questions will have to be considered, *e. g.* can the duty be restricted to cases like Peek *v.* Derry; or, if extended beyond the facts of that case, can it be confined within reasonable limits; or does the recognition of the duty in that class of cases necessarily carry with it the recognition of a similar duty in a much wider class of cases where great injustice would result from its enforcement? These latter questions really present the principal difficulty in this matter; and it is intended, at a later stage of the discussion, to give them due consideration. But, for the present moment, we are concerned only with the question whether this duty should be recognized, if its application could be restricted to cases similar to Peek *v.* Derry.

In Peek *v.* Derry the following propositions may be regarded as established: —

1. Defendants volunteered a statement to the plaintiff.
2. The statement was not true in fact.
3. Defendants, though believing the statement, had no reasonable ground for such belief, and would not have entertained it if they had used reasonable care to ascertain its truth.
4. Defendants made the statement with the intention that plaintiff should act upon it in a matter of business.
5. Defendants' motive was to procure pecuniary advantage to themselves.
6. The subject-matter of the statement was such that plaintiff, if he acted in reliance upon it, would be likely to incur substantial pecuniary loss in case the statement proved incorrect.
7. Plaintiff acted in reliance upon the statement.
8. Plaintiff was damaged by so acting.

To these propositions it would seem that we may properly add one more — not a subject of special discussion in that case — viz. Plaintiff acted reasonably in relying upon the defendants' statement.

Assuming the facts to be as above, the argument for defendants' liability is so obvious that there can be no need to enlarge upon it. We may fairly call upon the defendants to show cause why they should be exonerated. What are the arguments in their behalf?

The defendants may urge that allowing an action for negligence upon the facts of Peek *v.* Derry amounts to practically asserting that negligence is the full equivalent of deceit; or that it blurs the distinction between deceit and negligence. But a careful comparison of the requisites in an action for deceit with the facts of Peek

v. Derry will disclose important differences in more than one particular, showing that the plaintiff in Peek *v.* Derry makes out a much stronger case than would be necessary to his recovery if the defendants had been guilty of conscious falsehood. Thus, in Peek *v.* Derry the statement was volunteered by the defendants; whereas, in an action for deceit, the defendant may be liable though the statement was made in answer to an inquiry. It is also true in Peek *v.* Derry that the statement was made by the defendants with the motive or purpose of serving their own pecuniary interest; whereas, in an action for deceit, it is not necessary to show such a motive. Again, in Peek *v.* Derry the plaintiff acted reasonably in relying upon the defendants' statement; and this is an essential feature of his claim to recover for the defendants' negligence. A plaintiff suing for defendants' negligence will be barred by his own contributory negligence. But the case is different where the plaintiff is suing for defendants' intentional wrong. In an action for deceit, although there is some conflict in the authorities, it is the better view that the defendant cannot escape on the ground of the plaintiff's negligence. In other words, defendant cannot say that plaintiff's folly in believing what defendant intended him to believe exonerates defendant from liability for his conscious falsehood, uttered by him with intent to induce plaintiff to believe and to act upon it.

Defendants may seek to justify allowing a remedy in cases of deceit and denying it in cases of negligence, upon the ground that in deceit there is always moral blame. But is there not moral blame in negligence? Undoubtedly the turpitude is not so great as in lying, but in its civil aspect it differs only in degree. And where a man having especial opportunities for information makes statements with the intention of inducing the hearer to take important action in reliance thereon, and makes these statements without reasonable grounds, his moral fault is great. The question is not whether a remedy shall be allowed for all negligent misstatements, but whether it shall be allowed in a class of cases where the negligence is especially deserving of censure.

Can the defendants claim that the nature of the instrument whereby the wrong is done necessarily exonerates them from liability? Strictly speaking, and according to the better juristic definitions, words are "acts."[1] And even if, recognizing "a

[1] See Terry's Leading Principles of Anglo-American Law, section 81. Compare 1 Bentham's Introduction to the Principles of Morals and Legislation, chap. vii. section xii.

certain antithesis between saying and doing in common speech," we distinguish words from other acts, still the law in various instances holds that actionable wrongs may be committed by "mere words." [1] But it has been supposed in some quarters that the law, although not denying in all cases remedy for damage caused by words, draws the line at negligence. While the man who knowingly utters a false statement may be liable in an action of deceit, and the utterer of defamatory statements may be liable in an action of slander (irrespective of negligence), it is said that, "generally speaking, there is no such thing as liability for negligence in word as distinguished from act;" and it is averred that "this difference is founded in the nature of the thing." [2]

What are the intrinsic differences between words (spoken or written) and other acts, which justify this broad distinction?

It has been urged as a reason for non-liability that language (*e. g.* a statement in a valuation or a prospectus) cannot be considered "a dangerous instrument," or "an instrument which is dangerous in itself." This argument is beside the real issue. No one contends that the utterance of non-defamatory language belongs to the class of extra-hazardous acts where the actor is held to the liability of an insurer; like the keeping of a tiger. But disclaiming such a rigorous rule, the question is whether there may not be in some cases a duty to use reasonable care in the utterance of language. It is undeniable that the making of erroneous statements without reasonable grounds is liable under some circumstances to cause damage, and frequently causes great damage. Why not then impose in certain cases a duty to use reasonable care to refrain from making erroneous statements? If in handling a pen I carelessly scratch my neighbor's face, I am liable to him for the damage thus done. If, with the same pen, I write a letter to my neighbor making statements not true in fact, whose untruth would have been known to me if I had used reasonable care, and my neighbor is induced (as I intended he should be) to peril his fortune in reliance on my statements, why should he be denied a remedy against me in case of his financial ruin? Must a man take care as to the use of his arm, but not as to the use of his tongue? Must he take care how he hits another person with a pen, but not how he affects the interests of that other person by what he writes with the same pen?

The objection of novelty will probably be urged. There is, it

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[1] See Terry, *ubi supra.*

[2] Pollock, Torts, 2d ed. 487.

will be said, a total lack of precedent for the imposition of liability in such cases.

To this it may be answered: First, that there is a special reason why the experiment of an action for negligence *eo nomine* has not been attempted; second, that, in fact, liability has repeatedly been imposed in similar cases under the cover of legal fictions.

The failure, hitherto, to attempt the experiment of bringing actions for negligence *eo nomine* is in considerable degree to be accounted for by the fact that, until very lately, a remedy for negligent misstatement was supposed in many quarters to be obtainable at law under a declaration counting on deceit,[1] (and indeed may still be thus obtained in some parts of the United States.) Of the widespread existence of such a supposition, the decision of the Court of Appeal in Peek *v.* Derry affords ample evidence; but reference may also be made to the explicit statements of leading text-writers in volumes published shortly before the decision of the House of Lords in that case.[2] So, too, it was long understood that, whatever might be the rule at law, a remedy for negligent misrepresentation would be allowed by courts of equity in all cases falling within their jurisdiction; and this view was not distinctly rejected in England until the recent decision in Low *v.* Bouverie, subsequent to Peek *v.* Derry.[3]

Nor is it true that there is a total lack of precedent for imposing legal liability in cases of negligent misstatement. No doubt, actions for negligence *eo nomine* are scarce; but liability for such misstatement has frequently been imposed under cover of legal fictions.[4] This is true of certain decisions professedly based on "implied" representations, or "implied" warranties, or "conclusive presumptions of knowledge,"[5] and the like. Implications and

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[1] See Beven on Negligence, 2d ed. 1474.

[2] See 1 Bigelow on Fraud (edition of 1888), 509, 516, 517; 2 Pomeroy Equity Jur. (edition of 1882), section 884, and comment in 2d ed. published after the decision in Derry *v.* Peek, vol. 2, section 884. See, also, Moncrieff's Law of Fraud and Misrepresentation, 130–137.

[3] See Lindley, L. J., in Low *v.* Bouverie, L. R. (1891) 3 Chan. 82, p. 100; Pollock's Law of Fraud in British India, 31, 46, 47.

[4] The nominal *ratio decidendi* in some of these cases would go far enough to include even non-negligent misstatements. But it is probable that in the vast majority of these cases the misstatements were negligently made.

[5] "The directors are conclusively presumed to know the condition of the bank. . . . If the directors did not know the bank was insolvent, it was their duty to have known it." Clark, J., in Tate *v.* Bates (1896), 118 North Carolina, 287, p. 308.

"It is the duty of the directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which

presumptions are often resorted to for the purpose of concealing the fact that the judge is laying down a new rule of substantive law. "It is very desirable that we should get quit of these 'idola' of legal fraud, and implied representation, and attain to some general rule as to the reasonable care which every one is bound to take lest his words or acts harm his neighbor. . . ."[1] Moreover, in addition to these indirect enforcements of liability for negligent misrepresentation, there is at least one decision, even in England, which squarely affirms such liability. The decision in George *v.* Skivington (A. D. 1869) rests on this basis; and the *ratio decidendi* is clearly stated in the opinion of Cleasby, B.[2] In that case B. bought a bottle of hair-wash of A., stating that it was to be used by X. A. negligently represented that the liquid was fit for use on the hair. X. used the wash, and suffered physical damage from its unfitness. X. was allowed to recover against A.[3] Efforts have recently been made to distinguish George *v.* Skivington from

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is their duty to know, and which they have the means of knowing." Acker, J., in Seale *v.* Baker (1888), 70 Texas, 283, p. 290.

"It is there said that the *scienter* may be proved by showing—. . . third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. . . . For when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes, from the existence of these facts, that defendant had actual knowledge of the falsity of his statement; or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred." Carter, J., in Watson *v.* Jones (Florida, 1899), 25 Southern Reporter, 678, p. 682.

See, also, Ward *v.* Trimble (Kentucky, 1898), 44 Southwestern Reporter, 450, p. 452.

[1] 5 Law Quarterly Review, 102.

[2] L. R. 5 Exch. 1, p. 5.

[3] See, also, two recent American cases, where a person having no contractual relation with a physician recovered against him for damage caused by his negligent statement. Harriott *v.* Plimpton (1896), 166 Mass. 585; Edwards *v.* Lamb (New Hampshire, 1899), 45 Atlantic Reporter, 480; 14 HARVARD LAW REVIEW, 66. In the first case the physician, being employed by a third person to examine the plaintiff, negligently reported that the plaintiff had a certain disease, which in fact he did not have. In the second case the physician was employed by the plaintiff's husband, and, while treating him for an infectious sore, negligently advised the wife that it would be safe for her to assist in dressing the sore.

In Landie *v.* Western Union Tel. Co. (North Carolina, 1900), 35 Southeastern Reporter, 810, a telegram had not been delivered, and the telegraph company was not in fault for the non-delivery; but the company negligently asserted that it had been delivered. The court said: "We think that the assurance of the defendant, false

negligent misrepresentation in prospectuses and valuations, on the ground that the damage in George *v.* Skivington was physical. But what intrinsic difference is there between damage to the person and damage to the purse?[1]

Furthermore, in regard to the objection of novelty, it goes without saying that lack of precedent is not necessarily and always fatal. The leading case on deceit, Pasley *v.* Freeman, was in its day regarded as a new departure. And there is no topic of the law in which lack of precedent is entitled to less weight than in negligence. Negligence is largely a modern conception, and the scope of the action is constantly widening. Legal remedy is allowed to-day as to various states of facts where no one would have dreamed of suing a century ago. "As society becomes more complex, and the consequences of negligence more far-reaching, the obligation of using care becomes stricter in morals, and will have to become stricter in law, notwithstanding Derry *v.* Peek."[2] And the legal periodical just quoted said, shortly before the final decision in Peek *v.* Derry, . . . "the law is rapidly tending toward the enforcement (contrary, no doubt, to old authorities and some recent ones) of a general duty to be careful, as well as to abstain from wilful harm, in statements as well as in acts."[3] Of course

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in fact, if not in intention, was actionable negligence, and that the plaintiff can recover such damages as directly resulted therefrom."

[1] In this connection brief reference may be made to a line of decisions in this country as to liability for mistakes in the transmission of telegrams. If a telegram is delivered in an altered form, owing to the negligence of the telegraph company, has the receiver an action against the company for the loss that he sustains through acting on the telegram in its erroneous form? England says, no. America says, yes. The *result* reached in this country tends, in our opinion, to sustain the theory that there may be, under some circumstances, a legal duty to be careful in the use of language; we mean, of course, a duty not created by contract between the defendant and the plaintiff. But it must be admitted that the result has not generally been based by the court upon this broad ground; and that most of the reasons given for these decisions imply (what, indeed, is sometimes distinctly asserted) the non existence of such a duty. It is impossible, however, to examine the opinions in these cases without feeling that the courts have not touched bottom. Various reasons have been brought forward, but none command universal assent. On the contrary, the followers of any one theory are very apt to indulge in severe criticism of all the other theories; and it is sometimes admitted by those who sustain the result that no entirely satisfactory reason has yet been given. Under such circumstances one who believes in the result may fairly presume that a better reason exists; and it is submitted that such a reason can be found in the general doctrine suggested in this article. More than one thoughtful jurist has already expressed views *tending* in this direction. See Allen's Telegraph Cases, p. 455, note; Bigelow's Leading Cases on Torts, 626.

[2] 7 Law Quarterly Review, 107.

[3] 5 Law Quarterly Review, 103.

there are limits to the expansion of liability for carelessness; and an attempt has recently been made in this REVIEW to criticise a line of decisions whereby liability has been unduly extended.[1] It cannot, however, be denied that there is a general tendency to extend the obligation of using care.

Thus far we have been considering whether the law should recognize a duty to be careful in the use of language, if the enforcement of such duty could be confined to cases like Peek *v.* Derry. Our conclusion is that an action should be allowed in cases like Peek *v.* Derry; and, further, that the line should be drawn a little lower down so as to give a remedy in cases differing in two respects from Peek *v.* Derry. We do not think it an essential requisite that the statement should have been made from the selfish motive of serving the defendant's own interest. Neither should the action be confined to written misstatements. There is undoubtedly greater danger of mistake or falsehood in testimony as to the fact of verbal utterances than in testimony as to acts in general. But this acknowledged danger exists equally in actions for deceit by verbal statement; and yet such actions are universally allowed by the courts.[2]

There remains to be considered the most important objection to allowing an action for negligent misstatement. That objection may be stated as follows: "If the principle of liability for negligence in statements is once admitted by the courts as a ground for recovery, it cannot be confined to cases like Peek *v.* Derry (or to cases, like those we have suggested, modifying slightly the elements of Peek *v.* Derry). There will be no stopping-place short of enforcing a legal duty to use reasonable care in making *all* statements; and whenever any careless misstatement is acted upon by the hearer to his damage, an action will lie. The consequences would be deplorable. If the law took account of every idle word or chance remark, life would be intolerable."

It must be conceded that such a wide rule of liability would be fraught with evil consequences. If the law is really reduced to the alternative, either of denying remedy in cases like Peek *v.* Derry, or of admitting remedy for all careless statements followed by damage, it would undoubtedly be better to adopt the former alternative and refuse to allow remedy under any conceivable circumstances for negligent misstatements. But the law is not

[1] 11 HARVARD LAW REVIEW, 349, 434.

[2] It is the legislature, not the court, which has in some classes of cases restricted the remedy for deceit to instances where the statement was made in writing.

bound to take one of the horns of this dilemma, nor would such a course be sustained by analogy. Thus, the law allows in some cases an action for deceit, but does not give such an action for all lies. So the law treats certain defamatory words as actionable *per se*, but does not so regard all defamatory charges. The guiding principle of the courts is not logic, nor yet legal symmetry, but expediency. And there are strong grounds of expediency for adopting the rule we have suggested; and for refusing to entirely assimilate the duty of care in the use of words to the duty of care in the use of chattels. Even if the law recognizes that there may be such a thing as a duty to be careful in the use of one's tongue, it does not necessarily follow that the duty should be held to be as universal and as far-reaching as the duty to be careful in the use of one's axe. The cases differ, both in the stringency of the reasons for establishing a duty and in the weight of the burden which would thus be imposed.

On the one hand, negligence in the use of tangible objects is, in the great majority of instances, much more likely to cause serious damage than negligence in the use of language.

On the other hand, a duty to be careful on ordinary occasions in the use of language is a more burdensome restriction on humanity, a greater clog on freedom of intercourse, than a general duty to be careful in the use of chattels.[1] It is not consistent with common convenience to require a man to be as careful in the use of his tongue as in the use of his knife. Here is where we may properly fall back upon the previously quoted statement of Sir Frederick Pollock, that there is a difference "in the nature of the thing." That difference is such as to justify the imposition of a duty of care in the use of words more sparingly, and in a more restricted class of cases, than the duty of care in the use of chattels. But the difference is not so great as to justify the view that no duty of care in the use of language should ever be imposed under any conceivable circumstances.

While the following propositions can undoubtedly be expressed in better form, we submit that they formulate, in substance, the true rule on this subject.

An action for misstatement should be allowed when these requisites are present: —

1. Defendant volunteered a statement to the plaintiff.

[1] See Bramwell, L. J., in Dickson *v.* Reuter's Telegraph Co. (1877), L. R. 3 Com. Pl. Div. 1, p. 6.

[As to "volunteered," see subsequent explanation in reference to propositions 1, 4, and 5.

"To the plaintiff" includes not only statements made directly to plaintiff in person, but also statements made to third persons with the intent that they should be communicated to the plaintiff, and statements to the class of persons to which plaintiff belongs.]

2. The statement was not true in fact.

3. Defendant, though believing the statement, had no reasonable ground for such belief.

[This presents the inquiry of fact as to the conduct of the average prudent man; a common question for jurors in actions of negligence.]

4. Defendant made the statement with the intention that plaintiff should act upon it.

5. The subject-matter of the statement was such that one who acted in reliance upon it would be likely to incur substantial pecuniary loss in case the statement proved incorrect.

[See subsequent explanation in regard to propositions 1, 4, and 5.]

6. Plaintiff acted in reliance upon the statement, and such action and reliance on his part was reasonable.

[It may seem, at first blush, that if the defendant is negligent in making his statement, the plaintiff must also be negligent in giving it credence. But there are cases where this would not be true; as where the defendant had special sources of knowledge open to him, and the plaintiff not unnaturally supposed that the defendant had availed himself of these sources of information.]

7. Plaintiff was damaged by so acting.

The foregoing requirements will probably be found fault with upon very opposite grounds; one set of critics complaining that they err on the side of stringency, and another set alleging that thev are too lax.

Propositions 1, 4, and 5 are likely to be especial subjects of criticism on the ground of overstringency. One and the same general reason furnishes the argument for retaining these propositions in their present form. It will be admitted on all hands that men should not be held liable for unintentional misstatements in casual talk or in conversation upon apparently trivial matters; and that such liability should attach only under exceptional circumstances. But a general instruction of this nature by a judge in his charge to the jury would be practically equivalent to laying down no limit at all. It is not desirable to submit to the varying judgment of

successive panels of jurors the general question, under what circumstances the law should impose a duty to be careful in the use of language. On the contrary, the court should lay down definite tests, and then submit to the jury the question whether the evidence in the particular case in hand brings it within those tests. Any other course would inevitably result in the occasional rendition of verdicts upon inexpedient grounds, and in the frequent bringing of suits upon frivolous grounds. The tests adopted, without aiming at mathematical accuracy, should be such as will promote justice and discourage injustice in the greater number of cases.

Tried by these rules, propositions 1, 4, and 5 seem entirely defensible. In case of statements volunteered by the speaker, with intent that the hearer should act upon them, and with knowledge that action upon that subject-matter is likely to entail serious loss to the actor if the statement is incorrect, the average man ought to fully recognize his moral responsibility to be careful. But when any one of these elements is lacking, the hardship of imposing liability is sensibly increased.

A selfish motive on defendant's part does not seem to us an essential requisite, but the existence of such a motive might often be decisive evidence of the intent with which defendant made the statement.

Should the remedy be confined to negligent misstatements of fact, or should it be extended in some cases to the utterance of negligently formed (or negligently expressed) opinions? In the great majority of cases the utterer of a negligently formed opinion could escape liability on the ground that it was not reasonable for the hearer to rely on the mere opinion of another. The plaintiff would fail to sustain proposition 6, *ante*. But this would not always be true. Take the case of an expert stating to a non-expert his opinion on matters requiring peculiar skill or knowledge. Or take the case where the so-called "opinion" is in reality an assertion that facts exist which justify a certain conclusion. In such instances it is difficult to see why a plaintiff (who acts reasonably in relying on the statement) may not recover against one who negligently volunteers an erroneous "opinion," intending the plaintiff to act upon it, and knowing that substantial loss is likely to follow if the "opinion" proves incorrect.

If a duty to be careful in the use of language is admitted to

exist in certain cases, a defendant cannot plead that his utterance was a slip of the tongue, and did not express his real view. His liability must depend, not on what he meant to say, but on what he actually did say. Negligent misstatement exists just the same, whether it be due to carelessness in forming a belief or to carelessness in the mode of expressing one's belief. Whether a defendant in an action for deceit may escape liability by proving that he did not intend to convey the meaning which his words would naturally convey, is a question upon which able judges have recently differed.[1] But surely such a defence cannot be allowed where the action is founded, not on the charge of conscious falsehood, but on the charge of carelessness. Proof of good intent does not disprove an accusation of negligence.

If the right of action for negligent misstatement is once admitted, troublesome questions of a collateral nature may arise. Thus, it may be, in some cases, "a matter of difficulty to determine whether the plaintiff was one of the persons to whom the representation was addressed, and who were intended to act upon it." But questions of this description are not new to the law. The same difficulty occurs in actions for deceit, and does not prevent the courts from entertaining such actions.

Again, very nice questions may arise as to whether the defendant's fault can, in a given case, be regarded as the legal cause of the plaintiff's damage. But this is a difficulty which must be met in all cases of tort, and does not furnish *per se* ground for disallowing any remedy.[2]

So far, we have been considering cases where the damage to the plaintiff is caused, in one sense, by his own action, taken in reliance upon the erroneous statement made to him by the defendant. How is it if the damage results from the effect produced upon third persons by defendant's negligent misstatement concerning the plaintiff, inducing them to entertain and act upon an erroneous opinion of the plaintiff's character? In Hanson *v.* Globe Newspaper Co. (1893), 159 Mass. 293, the defendant published a

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1 Nash *v.* Minnesota Title Ins. & Trust Co. (1895), 163 Mass. 574.

2 "There remains, no doubt, the argument that liability must not be indefinitely extended. But no one has proposed to abolish the general rule as to remoteness of damage, of which the importance, it is submitted, is apt to be obscured by contriving hard and fast rules in order to limit the possible combinations of the elements of liability." Pollock on Torts, 2d ed. 488, 489; in reference to liability of telegraph company to receiver of message negligently altered by the company.

statement that a criminal charge had been made against a person, who was described by name and occupation. Such description applied to the plaintiff, and to no other person. A majority of the court held that plaintiff's action for defamation could be defeated by proof that the defendant did not intend to describe the plaintiff, but used the name by mistake for that of another person. The court say that whether there should be a liability founded on negligence "is a question which does not arise on the pleadings in this case," and that, so far as they are aware, "no action for such a cause has ever been maintained." The reason for this dearth of precedent is not far to seek. In an action for the negligent speaking of defamatory words a plaintiff would be at some disadvantage as compared with his position in an ordinary action of defamation.[1] Hence the experiment of a suit for negligent utterance of defamatory language would never be attempted unless it had first been decided that a suit for defamation could not be sustained. But if the novel decision in Hanson *v.* Globe Newspaper Co. is upheld as sound law, actions for negligence will undoubtedly be brought in similar cases; and no good reason is perceived why such actions should not be sustained, provided of course that due proof of carelessness and damage is forthcoming.[2]

Jeremiah Smith.

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[1] In an action for defamation in case of words actionable *per se*, the plaintiff would only have to prove that the defendant spoke the words. In an action for negligent utterance, he would have to prove also that the defendant acted carelessly in uttering the charge, and that damage had resulted therefrom.

[2] See the later Massachusetts case of Harriott *v.* Plimpton, stated *ante*, p. 192, note 3.